

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

LUCKINBILL, INC.,

Employer,

and

**ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, U.A., AFL-CIO,**

Petitioner.

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Case No. 14-CA-157045

PETITIONER’S REQUEST FOR REVIEW

Petitioner Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”), respectfully submits this request for review of Acting Regional Director Leonard J. Perez’s Decision and Certification of Election in the above-referenced case.¹

As we show below, the Acting Regional Director erred by affirming the Hearing Officer’s Report which had sustained Luckinbill, Inc.’s (“Luckinbill” or

¹ References to the Acting Regional Director’s Decision are cited as (Decision__); references to the Hearing Officer’s Report on Challenged Ballot and Objections are cited as (Report__); references to the transcript of the hearing are cited herein by witness and page, *i.e.*, “(Oaks__)”; exhibits are referenced as “(GCX __).” Emphasis is supplied herein unless otherwise indicated.

“the Employer”) challenge of Edward Oaks’ (“Oaks”) ballot, and erroneously concluded that two dual-function employees, Oaks and Kevin Simpson (“Simpson”), were not eligible voters and, therefore, were not wrongfully omitted by Employer from its *Excelsior* list.²

Statement of the Case

The material facts of this case are undisputed. Local 669 filed a petition for an election on July 30, 2015 and, by stipulated agreement, the parties agreed to an election held at Luckinbill’s facilities on October 1, 2015. Decision at 1. The *Excelsior* list provided by Luckinbill contained the names and contact information for eight (8) employees – six (6) employees who performed exclusively sprinkler installation work and two (2) dual-function employees. A total of eight (8) ballots were cast – four (4) ballots against the Union and four (4) ballots in favor of the Union. Decision at 1. The Board Agent challenged one (1) ballot, cast by Oaks, which would be determinative of the election. Decision at 1.

Local 669 filed timely Election Objections on October 8, 2015 alleging, *inter alia*, that Luckinbill had purposefully omitted two (2) eligible employees, Oaks and Simpson, from its *Excelsior* list. Decision at 1. A hearing on the Board’s challenge to Oaks’ ballot and Local 669’s objections was held on October 20, 2015. On November 4, 2015, the Hearing Officer issued a decision sustaining

² See *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966).

the Board's challenge to Oaks' ballot and overruling the Union's objections in their entirety. Acting Regional Director Perez subsequently sustained the Hearing Officer's Report and Recommendations on December 2, 2015. Decision at 4.

Argument

In affirming the Hearing Officer's Report on Challenges and Objections, the Acting Regional Director 1) failed to adhere to Board policy and procedure in representation cases; 2) inappropriately shifted the burden to the Union in the Employer's rebuttal case; and 3) failed to address the Union's primary argument in its exceptions to the Hearing Officer's Report -- that the decision to unilaterally include some but not all eligible employees was arbitrary and impermissible.

1. The Acting Regional Director's decision largely ignored that the burden to create and produce the *Excelsior* list is solely on the Employer. *Excelsior*, 156 NLRB at 1242-43. The employer provides the *Excelsior* list precisely because of its possession of a clear advantage concerning the knowledge of which employees perform bargaining unit work and will be eligible to vote in an election. *Women in Crisis Counseling & Assistance*, 312 NLRB 589, 589 (1993).

Here, the parties *agreed* that dual function employees *were* eligible to vote and would be included on the *Excelsior* list. Cooley 33, 65. Yet the Employer unilaterally determined to exclude at least two (2) dual-function employees, Oaks and Simpson, in violation of the parties' explicit agreement. *Halsted*

Communications, 347 NLRB 225, 225-26 (2006) (Where the parties' intent regarding the scope of the bargaining is unambiguous the Board enforces that agreement).

The Acting Regional Director attempted to justify these omissions by noting that the Union should have objected to the exclusion of Oaks and Simpson prior to the election. Decision at 3. This reasoning is flawed. The Union did not discover that these employees were performing bargaining unit work until well after the *Excelsior* list was transmitted, just prior to the election. And Luckinbill's management witness, Cindy Cooley, admitted that even she was unaware that Simpson performed bargaining unit work until "[r]ight around the time of the election." Cooley 69.

And even if Petitioner had known there were other eligible dual-function employees prior to the election, a point we are not conceding for the Acting Regional Director, to affirm the Hearing Officer's report by claiming that Petitioner should have addressed the matter prior to the hearing is inconsistent with the Board's own rules and policies favoring a *post*-election resolution of individual eligibility questions. The Board's newly implemented election rules encourage parties to reserve issues of eligibility and challenges until *after* the election. See NLRB Rules & Regulations §102.64(a) ("the purpose of the pre-election hearing is to determine if a question of representation exists and provides that disputes

concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted”). *See also* GC Memo, 15-06, April 6, 2015.

Thus, the Acting Regional Director erred by concluding that the Union “had sufficient opportunity” before the election to object to Oaks and Simpson’s exclusion from the *Excelsior* list or that it was a failure on the Union’s part to neglect to bring up these omissions prior to the election.

2. The Acting Regional Director also improperly disregarded the Union’s request of the Hearing Officer to draw an adverse inference from the Employer’s failure to call the management official who made the critical decisions as to who to include and exclude on the list, and then compounded the error by shifting the burden to the Union to call the Employer’s decision-maker. Decision at 4.

The Regional Director’s failure in this regard is apparently based upon a misunderstanding and/or misreading of the record. While the Acting Regional Director recognized that Luckinbill’s Director of Legal, Claims and Risk Management, Cindy Cooley, created the *Excelsior* list, he failed to recognize the undisputed fact, revealed near the close of the hearing, that it was Mr. Luckinbill who instructed her as to which dual-function employees to include and exclude. Cooley 294-95.

The Employer made a tactical decision to substitute the testimony of Cooley in lieu of the testimony of the decision-maker, and she was unable to provide Mr. Luckinbill's actual motive for excluding the two dual-function employees, Oaks and Simpson. Cooley 294-95.

And both the Acting Regional Director and the Hearing Officer erred by failing to draw an adverse inference from Mr. Luckinbill's nonappearance as a witness, which creates the inference that his testimony regarding the decision-making process would have been unfavorable to Luckinbill. *See e.g., West Oakland Home, Inc.*, 307 NLRB 288, 298 (1992) (adverse inference drawn where decision-maker did not appear).

Contrary to the Acting Regional Director's decision, Board law is also clear that the burden lies with the Employer where, as here, there is a dispute over the inclusion of dual-function employees as it is the party with access to the relevant records. *Harold J. Becker Co.*, 343 NLRB 51, 52 (2004); *Specialty Healthcare and Rehab. Center*, 357 NLRB No. 83 (2011), slip op. at 12-13, n. 28.

3. Finally, the Acting Regional Director ignored and failed to address the Union's argument that the Employer arbitrarily included some, but not all, dual-function employees on its *Excelsior* list. In affirming the Hearing Officer's Report in this regard, the Acting Regional Director noted that the employees who Luckinbill failed to include did not meet the community of interest test because

they spent less than 20% of their time performing bargaining unit work. Decision at 2-3.

Although it is generally true that dual-function employees spending less than 25 percent of their time performing bargaining unit work are *not* typically included on the agreed-upon unit, neither of the dual-function employees the Employer *included* on its *Excelsior* list, Bales or Thomasian, met that 25 percent threshold.³

The Employer's selection of which dual-function employees would be included on the *Excelsior* list was entirely arbitrary and, therefore, impermissible under the established NLRB principle that the arbitrary grouping of employees in a bargaining unit is not permitted. *Turner Industries Group, LLC*, 349 NLRB 428, 430 (2007) (citing *Moore Business Forms, Inc.*, 2004 NLRB 552 (1973); *Glosser Bros., Inc.*, 93 NLRB 1343 (1951)). This principle is applicable here to the inclusion of dual-function employees in a petitioned-for unit -- a party may not draw arbitrary lines between similarly situated employees to arrive at the

³ At the hearing, Luckinbill employee Cooley testified as to the amount of bargaining unit work each dual-function employee performed in percentages. Cooley specifically stated that the two dual-function employees included on the *Excelsior* list, Bales and Thomasian, spent "less than 20 percent" working on sprinkler installation jobs. Cooley 295-96. Therefore, *none* of the four dual-function employees performing sprinkler installation work for the Respondent spent the 25 percent of time performing unit work that the Hearing Officer used to justify the exclusion of Oaks and Simpson from the *Excelsior* list. Report at 5, 11. The Hearing Officer acknowledged as "instructive," but then rejected as not "dispositive," the undisputed fact that *none* of the "dual function" employees that were *included* in its *Excelsior* list, Bales and Thomasian, met even the twenty (20) percent benchmark. Hearing Officer's Report at 5.

appropriate unit. *Brenmar Construction, Inc.*, 2007 NLRB Reg. Dir. Dec. LEXIS 328 (Dec. 4, 2007).

The four (4) dual-function employees in this case are similarly situated, and share the *same* interest in the petitioned-for unit's terms and conditions of employment, but two (2) were arbitrarily excluded from the unit by the Employer. This is precisely the type of arbitrary selection of employees for inclusion in the unit that the Board seeks to avoid. *Hydro-Temp Mechanical, Inc.*, 2013 NLRB Reg. Dir. Dec. LEXIS 147 (Dec. 3, 2013).

The Region's failure to acknowledge and address these omissions is an error warranting the Board's review and reversal. *Sonfarrel, Inc.*, 188 NLRB 969 (1971); *Woodman's Food Market, Inc.*, 332 NLRB 503, 504 (2000).

Conclusion

For the reasons stated, Local 669 respectfully requests the Board overturn the Acting Regional Director's Decision and order the direction of a re-run election to properly include the two dual-function employees purposefully excluded from the Respondent's *Excelsior* list.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing Petitioner's Request for Review of the Regional Director's Decision have been served on the following this 16th day of December, 2015 by electronic mail:

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